STATE OF MICHIGAN

COURT OF APPEALS

DONNA PENN,

Plaintiff-Appellant,

v

CITY OF BERKLEY, ROBERT NORTH, and MICHAEL TUZINSKY,

Defendants-Appellees.

UNPUBLISHED
December 28, 2004

No. 249148
Oakland Circuit Court
LC No. 2001-037214-NZ

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

In this harassment and retaliation action, plaintiff, a dispatcher with the Berkley Department of Public Safety, appeals as of right from orders granting summary disposition to defendants, the City of Berkley and two Public Safety lieutenants. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's complaint set forth three counts: Hostile work environment[1] and retaliation[2] under the Civil Rights Act[3] (CRA), and the common-law tort of intentional infliction of emotional distress. The circuit court dismissed the harassment and retaliation claims with respect to defendants North and Tuzinsky, on the ground that a supervisor engaging in activity prohibited by the CRA may not be held individually liable for the violation. The court further dismissed the emotional distress claim, concluding that plaintiff's allegations did not rise to the level of extreme and outrageous conduct. In a subsequent order, the court dismissed the remaining claims against the defendant City.

This Court reviews a decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

[1] MCL 37.2103(1).

[2] MCL 37.2701(a).

[3] MCL 37.2101 *et seq*.

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). The court considers the pleadings, affidavits, and other evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Id.* "The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

The circuit court correctly concluded that *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 485; 652 NW2d 503 (2002), required that it grant summary disposition to the individual defendants.[4]

The circuit court also correctly determined that plaintiff could not sustain her claims against the city. To sustain a hostile-workplace cause of action, the objectionable conduct must be inherently sexual in nature. *Corley v Detroit Bd of Ed*, 470 Mich 274, 279-280; 681 NW2d 342 (2004). Commentary disparaging plaintiff as marrying for money and ruining her husband's life is not inherently sexual in nature. The single comment that can be seen as sexual in nature was made under circumstances where Tuzinsky did not know that plaintiff was present. Nor was Tuzinsky's letter, written to a co-worker, and not revealed to plaintiff until years later, sufficient to create a hostile environment.

Nor did plaintiff establish a genuine issue of material fact regarding her claim of retaliation. An employee claiming retaliation must show that the employer took some adverse employment action in response to protected activity. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 311; 660 NW2d 351 (2003). See also *Hunt v City of Markham*, 219 F3d 649, 653 (CA 7, 2000). An adverse employment action is an adverse affect on the terms or conditions of the plaintiff's employment. *Peña, supra* at 314. This does not include ostracism or isolation by coworkers. *Id.* at 315. Instead, an adverse employment action "typically takes the form of an ultimate employment decision, such as . . . termination . . . , . . . demotion . . . , a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.* at 312 (internal quotation marks and citations omitted). Plaintiff has failed to meet this threshold.

---

[4] In *Elezovic v Ford Motor Co*, 259 Mich App 187, 197; 673 NW2d 776 (2003), another panel of this Court expressed dissatisfaction at having to follow that aspect of *Jager*. However, this Court declined to convene a special panel to resolve the conflict. 259 Mich App 801; 677 NW2d 378 (2003). While our Supreme Court has granted leave to appeal in *Elezovic*, 470 Mich 892; 683 NW2d 144 (2004), *Jager* remains binding unless and until our Supreme Court decides otherwise. MCR 7.215(C)(2).

Lastly, to prevail on a claim of intentional infliction of emotional distress, the plaintiff must show that the defendant intentionally or reckless engaged in extreme and outrageous conduct that proximately caused the plaintiff to suffer severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). "Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.*

In this case, plaintiff points to no factual allegation that could reasonably approach the required threshold for extreme and outrageous conduct. Plaintiff asserts that defendant Tuzinsky derided her as responsible for her husband's death, suggested that she was too old to be sexually attractive, and stated that women generally marry for purely practical advantages, and that her employer both failed to take corrective action, and inconvenienced her with adverse decisions regarding overtime pay, vacation time, and isolation from coworkers.

The conduct plaintiff describes was rude and offensive, and the managerial decisions of which she complains were inconvenient and initially unfair to her. We conclude, however, that plaintiff has failed to describe conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable . . . ." *Haverbush, supra* at 234.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly